YAP AMI & ANOR.

v.

TAN HUI PANG

FEDERAL COURT, KOTA BHARU
SUFFIAN LP
LEE HUN HOE CJ (BORNEO)
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 149 OF 1981]
17 JULY 1982

DAMAGES: *Deceased died in a wild boar hunting accident - Claim on behalf of dependants - Liability admitted by the respondent to the extent of 70% - Award by trial Judge only for loss of expectation of life, special damages and costs - No award for loss of dependency - Dependants being paid the monthly drawings of the deceased from his partnership firm - Whether any loss of dependency.*

This is an appeal against the decision of the learned trial Judge Mohamed Zahir bin Haji Ismail J, who in a suit for damages under ss. 7 and 8 of the Civil Law Ordinance, 1956 declined to award damages for loss of dependency although he awarded damages for the appellants for loss of expectation of life at RM2,800, special damages of RM959 and costs of RM1,000.

The appellants as administrators of the estate of Chuah King Long, deceased filed a claim for damages against the respondent for negligence on behalf of the dependants at High Court, Kota Bharu. The deceased died as a result of a gun-shot wound inflicted by his fellow hunter the respondent during a wild boar hunting accident in Telaga Papan, Trengganu.

The learned Judge did not allow the claim for loss of dependency as on the agreed facts the dependants were being paid the deceased's monthly drawings of RM1,450 after his death from his motor partnership business and as such the dependants had not suffered any loss.

The issue before the Federal Court was whether or not the plaintiffs as representatives of the deceased's estate are entitled to damages for loss of the deceased's future earnings for the benefit of the estate.

Held:

[1] The estate has lost nothing, the dependants have also lost nothing and are in fact receiving more from the deceased than what they were receiving before his death.

[2] In the circumstances, the appeal is dismissed with costs.

[Appeal dismissed with costs.]

Cases referred to:
Gammell v. Wilson [1982] AC 27
Thangavelu v. Chia Kok Bin [1961] 2 MLJ 277

Legislation referred to:
Civil Law Ordinance 1956, ss. 7, 8
Law Reform (Miscellaneous Provisions) Act 1934 [UK], ss. 1, (1), (2)(c)

For the appellants - Ong Chin Beng (Foo Say Ghee with him)
For the respondent - H.S. Lim

JUDGMENT

Suffian LP:

Mr. Chua Kim Long ("the deceased") died in a wild boar hunting accident in Telaga Papan, Trengganu, and his widow and another as representatives of his estate sued for damages on behalf of the deceased's dependants under s. 7 and on behalf of his estate under s. 8 of the Civil Law Ordinance 1956 ("the Ordinance").

Liability to the extent of 70% was admitted and so the only question for the learned trial Judge was damages. In the event, he awarded RM2,800 for loss of expectation of life, RM959 special damages, and costs of RM1,000; all amounts agreed. He made no award for loss of dependency.

It is against this last that the plaintiffs have appealed to us.

Sections 7 and 8 of the Ordinance provide:

> 7. (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.
>
> (2) Every such action shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.
>
> 8 (1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:
>
> Provided that ..... (not relevant).
>
> (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person -
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> (a) .....
>
> (b) .....
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> (c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.
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> (5) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by s. 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

These provisions are *in pari materia* with the English Fatal Accidents Act 1976 and the English Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act").

The provision that is specifically relevant is sub-section 8(2)(c) of our Ordinance. The corresponding English provision i.e. s. 1(2)(c) of the 1934 Act fell to be considered by the House of Lords in *Gammell v. Wilson* [1982] AC 27.

That provision and sub-section (1) of the section read:

> (1) Subject to the provisions of this section, on the death of any person ... all causes of action ... vested in him shall survive ... for the benefit of his estate...
>
> (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person .....
>
> (a) .....
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> (b) .....
>
> (c) where the death of that person has been caused by the acts or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death ....

In *Gammell* [1982] AC 27, the deceased, when he was 15 years old, was killed by the negligent driving of the first defendant, an employee of the second defendants. The deceased's father brought an action claiming damages (1) under the Fatal Accidents Act 1976 for himself and his wife, as dependants of their dead son, and (2) also as administrator of the deceased's estate under s. 1 of the 1934 Act. The plaintiff and his wife were awarded damages on the first claim which, in the event, were extinguished by the award on the second claim under the 1934 Act. On that claim the learned trial Judge found that the deceased, if he had lived would have been a modest wage earner and that, after making allowance for his living expenses, he, would have had an average of £416 a year remaining. Applying a 16-year multiplier, the Judge arrived at £6,656 for loss of future earnings. Thus on the second claim the plaintiff was awarded the total amount of £9,590, made up of loss of future income, £6,656; special damages, £1,184; and loss of expectation of life, £1,750. The Court of Appeal affirmed the decision in part, reducing the sum of £1,750 to £1,250.

On further appeal, the House of Lords dismissing the appeal held that (1) a cause of action vested in the deceased immediately before his death; (2) by s. 1(1) of the 1934 Act that cause of action survived for the benefit of his estate; (3) since the cause of action so vesting in the deceased includes the recovery of damages for loss of earnings during the lost years and (4) since s. 1(2)(c) of the 1934 Act is to be construed as referring only to losses or gains accruing because of the death and not to damages recoverable in a cause of action vesting in the deceased immediately before his death, such damages are accordingly recoverable and therefore the learned Judge was right to award damages for loss of future earnings.

In the instant case, the learned Judge awarded nothing in respect of loss of dependency because on the agreed facts the deceased before his death was an active partner in Syarikat Hock Seng Motor at 3338 Jalan Sultanah Zainab, Kota Bharu and as such partner was drawing RM1,450 per month and after his death that very amount being the deceased's share of profit in the partnership was and is being paid to his dependants and as the dependants had suffered no loss - in fact they have gained - they are not entitled to any compensation.

The issue before us, and it is a novel issue in the Malaysian Courts as stated by Sim JC in *Thangavelu v. Chia Kok Bin* [1961] 2 MLJ 277, is whether or not the plaintiffs as representatives of the deceased's estate are entitled to damages for loss of deceased's future earnings for the benefit of the estate.

The English legislation on which ours is modelled had its origin in the Fatal Accidents Act of 1846 which as subsequently amended over the years became the Fatal Accidents Acts 1846 to 1908, since consolidated as the Fatal Accidents Act 1976.

If a person is injured he has a cause of action and can recover damages from the wrongdoer. But if he dies from his injuries before suing and obtaining judgment, his cause of action lapses, for the common law rule is that, *actio personalis moritur cum persona* : a personal action dies with the person, so that no executor or administrator could sue for any tort committed against the deceased in his lifetime (except injuries to property). The right of action in tort was destroyed by the death of the injured party, because an action in tort was regarded originally as purely punitive.

So if he left a widow and dependent relatives who had looked to him for their support, they could recover nothing.

What the Fatal Accidents Acts did was to give his widow and dependent relatives a statutory cause of action for their benefit.

The statutory cause of action created and authorized by the Acts is for the benefit of the deceased's dependants and the damages recoverable under them are purely compensatory and are assessed according to the Court's estimate of the economic loss which the dependants have suffered and would continue to suffer in consequence of the withdrawal of the deceased's support.

The Acts did not enable the estate to recover damages arising out of the death, for the old common law rule *actio personalis moritur cum persona*, still applied. Thus the position remained until 1934 when the Law Reform (Miscellaneous Provisions) Act was passed. Section 1 of this Act abolished the old common law rule and enabled damages suffered by the deceased immediately before his death under the three heads - loss of earnings, pain and suffering and loss of expectation of life - to be recovered for the benefit of his estate in an action brought after his death.

The effect of the 1934 Act is not to create a new cause of action, but simply to enable his estate to recover these damages after his death.

As stated by Lord Scarman (page 76):

> Section 1(1) of the 1934 Act creates no cause of action, but provides only for the survival of an existing cause of action.

What survives is the cause of action which accrued to the deceased immediately before his death by which he could have recovered damages.

Section 1(2)(c) however provides, as earlier indicated, that the damages recoverable for the benefit of the estate "shall be calculated without reference to any loss .. to his estate consequent on his death."

The contention here is that the instant case is a claim under s. 8 of our Ordinance, it is a claim for the benefit of the deceased's estate, that the deceased was injured by his fellow hunter the defendant, that if he had not died he would have had a cause of action to recover damages for loss of future earnings, as he had died this cause of action survived for the benefit of his estate and in this action the plaintiffs should be entitled to recover damages for loss of future earnings.

While no House of Lords decision is binding on us nevertheless it is of high persuasive value, and following *Gammell* [1982] AC 27, I am of the opinion that the plaintiffs are entitled to damages for loss of future earnings.

The loss to a deceased's estate which s. 1(2)(c) of the 1934 Act says may not be recovered is not any loss, but loss to his estate consequent on his death. Loss of future earnings is not a consequence of the death and it may therefore be recovered.

Next arises the question of quantum. As earlier stated, the deceased was in his lifetime an active partner in this Motor business and earning RM1,450 a month. After his death that very amount continues to be paid to his estate. If he had survived and not died, would the partnership not have continued to pay him that income? Because of the relationship between the partners, probably he would have continued to receive the same amount. In that case, how can it be said that he has lost anything as a result of this unfortunate accident?

The estate has lost nothing, the dependants have also lost nothing and are in fact receiving more from the deceased than what they were receiving before his death.

In this circumstances I would dismiss this appeal with costs.

Also found at [1982] CLJ 410